United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2294

To be argued by
ARNOLD B. ELKIND

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P/S

UNITED STATES COURT OF APPEALS

For the Second Circuit

THERESA M. BURNS, as Administratrix of the Goods, Chattels and Credits of GEORGE VINCENT BURNS,

Plaintiff-Appellant,

-against-

PENN CENTRAL COMPANY, n/k/a PENN CENTRAL TRANSPORTATION COMPANY,

Defendant-Appellee.

On Appeal From The United States District Court

For The Southern District of New York

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

The plaintiff-appellant's principal claim of error is the denial of her right to a jury determination of fact issues. The main thrust of the defendant-appellee's brief, on the other hand, is to convince that the facts support a denial of recovery. Though not relevant to the law problem, its treatment of certain evidence requires restatements.

Trainman Burns, while qualified as a Conductor, was working as a Brakeman under the supervision of McGeoch at the time he was killed (67A). According to the defendant-appellee's records, Burns spent two-thirds of his time in freight service (128A).

The details with respect to prior stonings other than date and place were self-serving addenda inserted by defendant below in response to plaintiff's Requests to Admit (Requests at 9A; Answers at 13A). They were not made the subject of cross-examination nor otherwise explored in the interest of avoiding collateral issues. These unverified addenda have now been utilized by defendant-appellee to construct unsupported inferences (a) that the 125th Street Station per se was vulnerable (Appellee's brief, p. 2), (b) that an injured person was a passenger, for which there is no evidence (Appellee's brief, p. 2), and (3) that there was more risk to Burns inside the body of the car "since windows not persons were the stoning targets" [no evidence] (Appellee's brief, p. 11).

The specific relevant testimony of Assistant Conductor Charles Ruhs (Appellee's brief, p. 2) was as follows (58A):

"BY MR. ELKIND:

Q My question is, Mr. Ruhs, first, did anybody in the railroad ever tell you about stonings in the area between 125th Street and 138th Street?

A No.

Q All right. Second question, in giving your answers to whether or not there was a hazard in doing the work that you described to the judge in that particular area, would your answer have been different if you had been told that there had been stonings in that area?

A I would say it would be hazardous, yes.

MR. ELKIND: That is all."

Appellee includes a precis of the testimony of the Engineer, John Brown, for the purpose of showing that he would not have considered his job dangerous even if he had known of the 8 prior stonings and even though his head was close to a window of the train which is sometimes open (Appellee's brief, p. 2). Exhibit 2 (244A) shows the front of MU car 1166. The window to which Brown refers is a small fraction of the doorway. Burns was in the open doorway as shown on Plaintiff's Exhibit 3 (245A). Brown's exposure was necessary to the performance of his duties. It was not necessary for Burns to be in the open doorway. Reasonable jurors might consider the appellee's argument a comparison of apples and oranges.

In the appellee's Memorandum of Law submitted to the Trial Judge below (Court's Exhibit 1) the defendant-appellee incorporated (p. 28) a blatant and reprehensible violation of the rules of evidence (*Eichel v. New York Central R. Co.*, 375 U.S. 253 [1963]) by tabulating alleged insurance payments and "social welfare benefits" supposedly paid to the plaintiff-appellant. These included mortgage insurance, funds that were paid by "passing the hat" amongst Burns' fellow employees, and a charity set up by the Will of a deceased railroad official which is a benefit supplied "at will". That effort to subordinate the rule of law to extraneous considerations at the trial level, has been compounded in this Court in apparent reliance on the thesis that it is always open season on tort claimants in appellate courts.

These efforts to extricate a "substantial justice" affirmance should not deter this conscientious Court from examining the central legal issue to be reviewed.

In *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 510, the Court said:

> "The decisions of this court after the 1939 amendments teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the *infrequent* cases where fairminded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." (Emphasis supplied)

The Court of Appeals is relieved of the obligation of determining whether or not this is one of the "infrequent cases" where fairminded jurors could honestly agree only that the fault of the railroad played no part in the death of Trainman Burns. Presumably fairminded jurors honestly did disagree. The Court should not substitute esoteric theorization for the demonstrated reality of the jury disagreement below.

ANSWERING APPELLEE'S POINT I

Though appellee asserts (page 4) that FELA cases are "frequently" taken from juries, recorded legal history is absolutely to the contrary. See Appendix to opinion of Mr. Justice Douglas in *Wilkerson v. McCarthy*, 336 U.S. 53, 71, and footnote 26 in *Rogers v. Missouri Pacific R. Co.*, *supra*, p. 510.

The cases cited by defendant-appellee (Brief, p. 4) in which the infrequent bypass of the jury role in FELA cases was approved merit only these brief comments in reply.

Herdman and *Henagan* involved injuries due to normal unavoidable operating risks of train service in which the train was required to come to a sudden halt to avoid an accident.

Inman involved the knockdown by a motorist of a Flagman at a crossing whose place of work could not have been made safer even conceptually.

Moore's death was claimed to have been caused by the negligent handling of an engine knocking him off a footboard. The only evidence introduced established that the engine was operated with due care.

The *Brady* case in 1943 was substantially a procedural test of whether or not there could constitutionally be such an animal as a directed verdict or a judgment n.o.v. in FELA cases.

The *Nicholson* case in this Circuit involved an injury to an employee after her tour of duty had ended and while she was using a toilet in a passenger train enroute to her home, the claim being that she would not have had to use the toilet if the railroad had not negligently failed to provide a restroom facility at her place of employment.

Under the FELA the plaintiff has the burden of proof, but the quality of his evidence and the technical requirements on causation are simplified so that jurors may find for the

damaged employee in cases where an ordinary tort claimant would fail. As Chief Judge Kaufman observed in *Eaton v. Long Island Rail Road Co.*, 398 F.2d 738:

> "A reading of the cases makes manifest, however, that the FELA has been construed as an avowed departure from the rules of the common law and as imposing 'special features' with respect to the standard of negligence that is significantly different from that found in ordinary negligence actions."

In the *Eaton* case the claim of negligence was the inadequacy of the means of egress from a pit which was apparently in accord with the industry standard. With conceptual consanguinity to the claim of plaintiff-appellant here, Judge Kaufman wrote:

> "Moreover, in evaluating the defendant's conduct the jury could take into consideration the ease and presumably small expense of installing in the pit stairs, a ladder or some other safe means of egress. In determining whether a course of conduct is reasonable, the probability and gravity of injury must be balanced against the ease of taking effective preventive measures."

The opinions do not support defendant-appellee's black letter assertion that railroads may not be convicted of negligence on the basis of speculation or of hindsight (Appellee's brief, p. 4). As the Seventh Circuit said in *Heater v. Chesapeake and Ohio Railway Company*, 497 F.2d 1243, 1246:

"The test of a jury case, under the FELA, 'is simply whether the proofs justify with reason the conclusion that employer negligence played *any part, even the slightest,* in producing the injury or death for which damages are sought.' *Id.* at 506 (emphasis added). The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. In passing on the issues of fault and causality, moreover, the jury has a broad power to engage in inferences. 'The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944). The jury's verdict can only be set aside 'when there is a complete absence of probative facts to support the conclusion reached'. Lavender v. Kurn, 327 U.S. 645, 653,*66 S.Ct. 740, 90 L.Ed. 916 (1946). The Supreme Court has repeatedly warned that in FELA cases, 'courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.' Tennant v. Peoria & Pekin Union Ry. Co., *supra* at 35."

See Prosser, *op. cit.* p. 536 and *Isgett v. Seaboard Coastline R. Co.*, 332 F.Supp. 1127, 1140 (U.S.D.C., So. Car.)

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* The Supreme Court saying in Lavender: "It is no answer to say that the jury's verdict involves speculation and conjecture."

Since plaintiff-appellant places reliance on the teaching of the Supreme Court of the United States in *Lillie v. Thompson*, 332 U.S. 452, 462, that the character of the risk to railroad employees -- whether it comes from intentional or criminal misconduct -- is irrelevant, plaintiff-appellant presumes that all of the cases listed at pages 5 and 6 of appellee's brief must be irrelevant, with the sole exception of the *Hartel* case which has been dealt with in some detail in plaintiff-appellant's main brief. Our determination to disregard this list of citations was reenforced after checking the Second Circuit case in that list: *Mormino v. Leon Hess, Inc.*, 119 F.Supp. 314 (S.D. N.Y. 1953), aff. 210 F.2d 831 (2nd Cir. 1954) (Appellee's brief, p. 5). This case lacks even the most remote relationship to any issue involved in this appeal. The *Lillie* case, *supra*, is the leading case and controlling authority for the proposition that criminal misconduct is on the same footing as any other condition which becomes a mechanism of injury or death to a railroad employee.

The *Hartel* case in this Circuit, though distinguishable, simply runs upstream against the entire current of authoritative FELA decisional law (*Hartel*, 414 U.S. 980). From the standpoint of railroad employees it is regressive and cannot

be sustained as being in concordance with the established system for dealing with the damage claims of men who serve their fellowmen by undertaking the known hazards of an essential industry such as railroading. It is niggardly and shortsighted public policy to compel operating railroad employees to themselves shoulder the fallout from violence that so notoriously afflicts our society. The most fundamental notions of fairness require an allocation of the burden in accordance with the facts of each case.

Even in the absence of the authority of *Lillie, supra,* the presumption that behavior will be lawful should be re-examined and questioned.

It is said that the lifeblood of the law is human experience. It is tragic that recent human experience with urban propensity to crime has sapped all viability from the blind application of §302 B of the Restatement. This is particularly true in Harlem. Human experience has taught everyone that reasonable prudence requires the anticipation of violations of criminal law in that area. The reasonably prudent man does not leave his automobile unlocked with the key in the ignition switch in Harlem. The illustration for Comment d on §302 B of the Restatement of Torts 2d, relied

on by the defendant-appellee (p. 7) reads as follows:

> "A leaves his automobile unlocked, with the key in the ignition switch, while he steps into a drugstore to buy a pack of cigarettes. The time is noon, the neighborhood peaceable and respectable, and no suspicious persons are about. B, a thief, steals the car while A is in the drugstore, and in his haste to get away drives it in a negligent manner and injures C. A is not negligent toward C."

Note that in the illustration the neighborhood is described as peaceable and respectable.

Park Avenue at 125th Street is approximately at the borderline between the 25th and 28th Police Precincts of the City of New York. In 1968, the year before Mr. Burns was shot, there were 79 reported homicides in these two precincts, which is at the per capita rate of 63 for each 100,000 population. During that same year there were 10,906 robberies and burglaries reported in these two Police precincts.* No evidence was offered by either party on the subject of violence in Harlem except for the stoning incidents. Plaintiff-appellant assumed this to be a matter of common knowledge not requiring evidence. The defendant railroad should not be benefited by a demonstrably artificial presumption that Harlem in 1969 was a peaceable area.

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* New York Times, December 2, 1974, page 38.

There is no novelty in imposing upon an employer in a hazardous enterprise contractual obligations which surpass duties to third parties (*Harris v. Pennsylvania R. Co.*, 50 F.2d 866 [duty to attempt a rescue]; *Anderson v. Atchison, Topeka & Santa Fe R.R. Co.*, 333 U.S. 821 [duty to ascertain whereabouts of missing employee]; *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 [duty to prevent injury from environmental hazard]).

Prosser recognizes as an exception to the normal rule quoted by defendant-appellee (Brief, p. 8)

> "* * * other situations in which * * * a special responsibility [is] resting upon the defendant for the protection of the plaintiff * * *. The responsibility [to protect from criminal misconduct] may * * * be founded upon some relation existing between the parties, such as * * * employer and employee * * *."
> Prosser, 4th Ed., p. 174.

Defendant-appellee's arguments (Brief, pp. 10 and 11) are appropriate to jury argument and might very well persuade a jury to find for the railroad. Counter arguments are equally available, thereby demonstrating the appropriateness of jury determination.

It can be argued, for example, that the decedent should have been required to station himself at the interior door confining passengers there until the train actually entered

the station, whereupon in "less than 10 seconds" the trainman could open the steel exterior door and lift the trap without delaying schedules.

This would eliminate the hazard of standing in the open doorway and at the same time assist in the enforcement of the law requiring passengers to remain in the interior of the car.

At a minimum, since the railroad traditionally relied on the discretion of trainmen as to when this service was to be performed, it owed them the "no cost" duty to inform the trainmen of any facts which might affect their judgment. The stonings along the elevated trestle particularly merited communication since this area was not one where a reasonably prudent trainman could anticipate third party assault by missile.

The jury may still find after these arguments that Burns would have been shot through the steel door or through a window, but that conclusion is not available to this Court under the authoritative cases, except Hartel.

The judgment dismissing the complaint should be vacated and the case remanded to the U.S. District Court for a new trial.

Respectfully submitted,

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